87-879

No.

Supreme Court, U.S.
FILED
NOV 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

DONALD C. ODEGARD, JR., PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

COLONEL LEO L. SERGI
(Counsel of Record)
CAPTAIN HENRY J. SCHWEITER
Defense Services Division
Office of The Judge Advocate General of the Air Force
Bolling Air Force Base
Washington, D.C. 20332
(202) 767-1562

Attorneys for Petitioner

Of Counsel:
MAJOR WILLIAM H. LAMB
Wright-Patterson Air Force Base, Ohio 45433

QUESTION PRESENTED

1. Whether the petitioner was denied his due process right to present a defense in violation of *Chambers v. Mississippi*, 410 U.S. 284 (1973), where he was prevented from performing an in-court demonstration and from offering testimony of an out-of-court demonstration, either of which would have shown the government's theory of the case to have been a scientific impossibility.

2. Whether the petitioner was denied due process of law as required by the Fifth Amendment because the Air Force Court of Military Review applied an improper standard of appellate review in evaluating his case.

3. Whether the petitioner was denied due process of law as required by the Fifth Amendment because the trial judge's instruction to the jury on the government's theory of the case unconstitutionally shifted the burden of proof to petitioner.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	7
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Atkins v. United States, 240 F.2d 849 (5th Cir. 1957), *cert. denied*, 357 U.S. 974 *reh. denied*, 354 U.S. 943 (1957) 9

California v. Trombetta, 467 U.S. 479 (1984) 9

Chambers v. Mississippi, 410 U.S. 284 (1973) 7, 8, 9

Connecticut v. Johnson, 460 U.S. 73 (1983) . 14

Crane v. Kentucky, 476 U.S. 683 (1986) 8

Francis v. Franklin, 471 U.S. 307 (1985) ... 13, 14

Jackson v. Virginia, 443 U.S. 307 (1979) ... 12

Moore v. Chesapeake & O. Ry. Co., 493 F. Supp. 1252 (S.D. W.Va. 1980), *aff'd*, 649 F.2d 1004 (4th Cir. 1981) 9

Mullaney v. Wilbur, 421 U.S. 684 (1974) ... 13, 14

In re Oliver, 333 U.S. 257 (1948) 10

Patterson v. New York, 432 U.S. 197 (1977) 13

Rose v. Clark, 478 U.S. ____, 106 S.Ct. 3103 (1986) 14

Sandstrom v. Montana, 442 U.S. 510 (1979) 13, 14, 15

Tot v. United States, 319 U.S. 463 (1943) ... 15

Cases – Continued: Page

Rock v. Arkansas, 107 S.Ct. 2704 (1987) ... 8
Ulster County Court v. Allen, 442 U.S. 140 (1979) 14, 15
United States v. Adam, 20 M.J. 681 (A.F.C.M.R. 1985) 10
United States v. Cronic, 466 U.S. 648 (1984) 10
United States v. Gainey, 380 U.S. 63 (1965) 15
United States v. Grandmount, 680 F.2d 867 (1st Cir. 1982) 14
United States v. McDougald, 650 F.2d 532 (4th Cir. 1981) 13
United States v. Odegard, ACM 24656 (A.F.C.M.R. October 17, 1985), 25 M.J. 140 (C.M.A. 1987) ..... *passim*
United States v. Pohlot, 827 F.2d 889 (3d Cir. 1987) 8
United States v. Sanchez, 790 F.2d 245 (2d Cir. 1986) 13, 14
United States v. *Sikorski*, 21 U.S.C.M.A. 345, 45 C.M.R. 119 (1972) 10
United States v. Taliau, 7 M.J. 845 (A.C.M.R. 1979) 10
United States v. Yeager, 15 U.S.C.M.A. 226, 35 C.M.R. 198 (1965) 10
Washington v. Texas, 388 U.S. 14 (1967) ... 8
Wilson v. United States, 162 U.S. 613 (1896) 13
In re Winship, 397 U.S. 358 (1970) 12
Woodby v. INS, 385 U.S. 276 (1966) 12

Constitutions and Statutes:

U.S. Const. Amend. 5 ..... *passim*
28 U.S.C. § 1259(3)(Supp. III 1985) 1

Statutes – Continued: Page

Uniform Code of Military Justice:
Art 66(c), 10 U.S.C. § 866(c)(1982) 2, 4, 10, 13
Art. 67(h), 10 U.S.C. § 867(h)(Supp. III 1985) 1

Miscellaneous:

II J. Wigmore, *Evidence*, § 273 (3d ed. 1940) 13
Mil.R.Evid. 403 9

In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

DONALD C. ODEGARD, JR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Donald C. Odegard, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on September 30, 1987.

OPINIONS BELOW

The decision of the United States Air Force Court of Military Review was issued on October 17, 1985. *United States v. Odegard*, ACM 24656 (A.F.C.M.R. October 17, 1985). That decision is unreported, and is reproduced in the Appendix to this Petition. The decision of the United States Court of Military Appeals is reported at 25 M.J. 140 (C.M.A. 1987), and is reproduced in the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 10 U.S.C. § 867(h)(Supp. III 1985) and 28 U.S.C. § 1259(3)(Supp. III 1985). The judgment of the Court of Military Appeals was entered on September 30, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

Article 66(c) of the Uniform Code of Military Justice ("the Code"), 10 U.S.C. § 866(c)(1982), provides:

> (c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

STATEMENT OF THE CASE

This is a larceny case involving an Air Force Academy Cadet in which the proof of guilt is based on the use of a nearly invisible staining powder, methylene blue chloride (MBC), that becomes immediately visible when it come in contact with moisture on the human hand. The Air Force Court of Military Review summarized the facts of this case in its decision set out in the Appendix. As the Air Force Court of Military Review noted, the critical issue presented to them was the factual guilt of petitioner. A portion of their decision was a follows:

> The evidence showed that appellant had knowledge of the presence of some money in Pizzarello's desk, although he disavowed knowing exactly where it

was located. Appellant also had the opportunity to steal the money on Friday, 3 February, after he returned from lunch and before reporting to his first afternoon class. The absence of any blue stains on his hands and fingers that day or the next can be explained by noting the protection afforded by the envelope SA [Special Agent] Doughman fabricated. As we view the facts, appellant could have picked up the money-bearing envelope without touching the bills, and thereafter folded it in half several times with the exposed portion of the bills toward the inside of the fold. In this manner, the folded envelope could be secreted in a pocket of his checkbook underneath the blank checks without his skin ever coming in direct contact with the MBC [methylene blue chloride] on the bills. This would also prevent the money from coming in direct contact with the interior of the checkbook; only that MBC which sifted down within the folding envelope might contaminate the interior of the checkbook. It was this small amount of contaminant which SA Doerr found on his kimwipe after he carefully and thoroughly wiped all areas within the checkbook. This thoroughness on his part can explain why no residue was located on the checkbook when it was re-examined at the laboratories.

It was strenuously argued below in briefs and in oral argument before the Air Force Court of Military Review and the Court of Military Appeals that the character of this powder is not such that it could contaminate a checkbook in the manner described without also leaving traces not only on a kimwipe but also on the checks or other portions of the interior of the checkbook. There was no evidence of the powder remaining on the checkbook when it was later examined in a government laboratory. The Air Force Court of

Military Review, in the exercise of its fact finding powers under Article 66(c) of the Code, constructed a hypothetical scenario consistent with guilt, and the Court of Military Appeals followed the lower court in its disposition of this case. (Appendix A).

In order to demonstrate the impossibility of the government's theory of contamination, the defense offered to provide a demonstration of the properties of the powder either through in-court demonstration or testimony of an out-of-court experiment. (R. 12). The government made a written motion *in limine* seeking to prevent the defense from offering such evidence. (App. Exhibit VII; R. 217). The basis of the government motion was that "A party wishing to introduce evidence of a test or experiment, conducted either out or in court, must first show that the experiment was made, or is to be made under conditions and circumstances *similar to those prevailing at the time of the occurrence which the experiment is intended to reproduce. . .*" (App. Exhibit VII) (emphasis added). The military judge's ruling at R. 239-240 precluded either in-court demonstrations or testimony concerning out-of-court demonstrations on the basis that it was "impossible to duplicate what was done" in that there was no evidence of how the accused placed the money in the checkbook! The defense purpose for offering these experiments was not to show an event but to show that the natural properties of the staining powder rendered the government's theory of guilt, based on the presence of the powder several days after the theft in the places alleged, a scientific impossibility. Ironically, the report of the officer who conducted the pretrial investigation of petitioner's case (and who recommended that the case *not* proceed to trial) stated that more information regarding the physical properties of MBC was needed and opined that defense experiments regarding those properties should

be admissible at trial. The pretrial advice of the Air Force Academy staff judge advocate to the convening authority agreed that expert testimony about MBC should be admissible at trial.

The military judge first decided not to give a "consciousness of guilt" instruction and then decided to give it. (R. 281-282). The defense objected to the instruction on certain legal grounds. (R. 281). The instruction was given. (R. 302).[1]

The basis for the instruction was not that statements of the accused were inconsistent with the uncontradicted facts of the case, but that statements by the accused that he had not seen the money were inconsistent with his own testimony and that of the government witness, Cadet Pizzarello, who was the accused's roommate. (R. 281). Cadet Odegard testified that he remembered Cadet Pizzarello coming into the room and announcing that he had some money he could not spend that weekend because he was on confinements.[2] (R. 172). Three days after the theft was discovered, Captain Steele, during the search of Cadet Odegard's room, asked Cadet Odegard if he had seen the money – not did he deny knowledge that the money was ever present in

---

[1] In pertinent part, the instruction was as follows:

You are advised that conduct of an accused, including statements made and acts done upon being informed that a crime has been committed or upon being confronted with a criminal charge, may be considered by the court in the light of other evidence in the case in determining the guilt or innocence of the accused. When the accused voluntarily offers an explanation or makes some statement tending to establish his innocence, and such explanation or statement is later shown to be false, the court may consider whether this circumstantial evidence points to a consciousness of guilt. (R. 302).

[2] Confinements is a term describing an administrative disciplinary measure whereby Air Force Academy cadets are restricted to their dormitory rooms and the restroom.

the room. (R. 148). Cadet Odegard's statement that he had not seen the money was thus actually an exculpatory statement, and the government's belabored theory based on the literal language used is both a weak argument on the facts and an even weaker basis to give a "consciousness of guilt" instruction. Cadet Odegard also made an exculpatory statement to Special Agent Doerr of the Air Force Office of Special Investigations that he (Odegard) ". . . knew nothing about the theft or nothing about the money." (R. 112). The government sought to use such testimony in the light most favorable to their version of the facts (i.e., that petitioner denied knowing anything about the money at all) to provide a basis for a consciousness of guilt instruction. Cadet Odegard's statements to a Cadet Weeth after Cadet Odegard had been charged were likewise not in denial of knowledge that the money was in the room but were made in an effort to understand how (as he then thought was the case) his property had been contaminated by the staining power. (R. 153-154). (Later the results of examination of the wallet and checkbook in the laboratory showed no evidence of the powder, but Cadet Odegard could not know that at this time). Thus, the instruction was not given based upon an inconsistency between Cadet Odegard's statements on a prior occasion and the uncontradicted facts of the case, but on the basis of a tortured government theory inculpating the petitioner, which theory should stand the test of final argument without the military judge's assistance in this instruction.

The issues presented by this petition were raised before the Court of Military Review and the Court of Military Appeals. On mandatory review, the Air Force Court regarded the case as one involving evidentiary sufficiency and its decision was generally limited to that issue. The Court of Military Appeals granted discre-

tionary review on eight issues, 22 M.J. 379 (C.M.A. 1986), but chose to address only the question of its appellate review standard and the sufficiency of the evidence. 25 M.J. 140 (C.M.A. 1987).

REASONS FOR GRANTING THE WRIT

Suppose that an accused is charged with a theft to which there were no eyewitnesses, and the only evidence against him is circumstantial in nature. Concerned about inferences which the jury would draw from the existing evidence against him, this accused seeks at trial to offer demonstrative evidence to negate the inferences to be drawn from the evidence, but the trial judge's ruling prohibits him from introducing the evidence. Suppose further that on appeal the appellate court, in affirming his conviction, relies upon the very inference the accused sought to rebut. Such is precisely what transpired in the case at bar. The fact finder at trial was never shown the true properties of the powder the government alleged was used to dust the money that was taken, and the jury and the appellate courts have been left to speculate what happened.

I

Chambers v. Mississippi, 410 U.S. 284 (1973), and its progeny have established that due process requires that a defendant be able to present reliable and relevant evidence in his defense, notwithstanding rules of procedure and evidence to the contrary. Stating that "few rights are more fundamental than that of an accused to present witnesses in his own defense," this Court held that a state hearsay rule could not be applied so as to bar testimony that a person other than the defendant had repeatedly confessed to the crime of which the

defendant was accused. *Id.* at 292-293, 302-303. While the Court recognized that a defendant's right to present evidence could be limited by appropriate rules of procedure and evidence, it found that the particular evidence was both reliable and critical to the defense, and that its exclusion violated the defendant's right to an effective defense. *Id.*, at 302. Other cases have similarly held that the exclusion of reliable, material, and critical evidence is a violation of due process. *See, e.g., Crane v. Kentucky,* 476 U.S. 683 (1986) (reversing conviction for excluding evidence of cricumstances surrounding confession); *Cf., Washington v. Texas,* 388 U.S. 14 (1967) (striking down Texas statute prohibiting the testimony of defendant's alleged accomplices); *Rock v. Arkansas,* 107 S.Ct. 2704 (1987) (striking down state rule preventing defendant from testifying on issues previously the subject of his hypnosis); *United States v. Poholt,* 827 F.2d 889 (3d Cir. 1987) (Insanity Defense Reform Act could not constitutionally restrict the defendant's right to offer expert testimony negating specific intent element of the crime).

In this case, had the jurors seen the MBC powder in its application, with its properties of dispersion and adherence over a wide area to anything it touches, either through in court demonstration or through testimony regarding such an experiment, it would have been abundantly clear that the government's theory of the selective and extremely narrow discovery of stains in the places they claimed could not have occurred. A powder simply will not be inside the plastic insert of a wallet and not elsewhere on that wallet. A powder will not be present in the plastic flap of a checkbook and not elsewhere, especially if there is no evidence of powder stains on the paper side but only, presumably, on the plastic side, without staining the paper against which it is pressed. The failure and inability of the jury to ap-

preciate these incongruities, caused by the exclusion of the defense's demonstrative evidence, directly caused petitioner's conviction. One can scarcely imagine evidence more critical to the defense than that which would show the implausibility of the government theory of the case and which would controvert the wrongful taking element of the offense.

To justify his ruling, the trial judge relied on Mil.R.Evid. 403 (identical to the federal rule) and the anomalous proposition that the defense experiments (which had been conducted prior to trial) could not duplicate the conditions of the instant theft because there was no evidence of how the thief handled the money. (R. 239-240). Obviously, no one knows how the thief took the money. But to follow the judge's logic, if one posits a clever thief, any evidentiary inconsistency would be resolved against the accused. Any experiment of this nature would be precluded, and the burden of proof would be shifted. In fact, the point of the experiment was to show the characteristics of the powder and the corresponding inconsistency with the government's theory of the case, not to mislead the jurors as to the manner of the taking. A second point is that evidence of experiments need not duplicate the conditions of the event they purport to demonstrate; they need only be similar. *Atkins v. United States*, 240 F.2d 849 (5th Cir. 1957), *cert. denied*, 357 U.S. 974 (1957), *reh. denied*, 354 U.S. 943 (1957); *see also, Moore v. Chesapeake & O. Ry. Co.*, 493 F. Supp. 1252, 1266 (S.D. W.Va. 1980), *aff'd*, 649 F.2d 1004 (4th Cir. 1981). Finally, *Chambers* clearly stands for the proposition that evidentiary rules like Mil.R.Evid. 403, on which the judge here relied, must be subordinated to an accused's constitutional right to present reliable evidence in his own defense. 410 U.S. at 302.

The constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). An

essential component of the procedural fairness embraced by this guarantee is an opportunity to be heard. *In re Oliver*, 333 U.S. 257, 273 (1948). That opportunity was an empty one in this case because the evidence excluded by the judge was so central to petitioner's claim of innocence. There was no adequate justification for the exclusion of this evidence, and petitioner was unconstitutionally deprived of his basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." *United States v Cronic*, 466 U.S. 648, 656 (1984).

II

Article 66(c) of the Code places upon the Air Force Court of Military Review the responsibility to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact" in what is essentially a *de novo* review of the record of trial. 10 U.S.C. § 866(c) (1982). Where that court is "not convinced beyond a reasonable doubt" of guilt, it is obliged to set aside a finding of guilt. *See, e.g., United States v. Adam*, 20 M.J. 681, 683 (A.F.C.M.R. 1985). *United States v. Taliau*, 7 M.J. 845, 848 (A.C.M.R. 1979). Congress has specifically empowered courts of review "to make findings of fact opposite to those made at the trial level." *United States v. Yeager*, 15 U.S.C.M.A. 226, 35 C.M.R. 198, 199 (1965). *United States v. Sikorski*, 21 U.S.C.M.A. 345, 45 C.M.R. 119, 122 (1972). There must however, be evidence in the record to support such factual findings.

As noted *supra*, the Air Force Court of Military Review in its decision opined that:

> . . . appellant *could have* picked up the money-bearing envelope without touching the bills, and thereafter folded it in half several times with the

> exposed portion of the bills toward the inside of the fold. In this manner, the folded envelop *could be* secreted in a pocket of his checkbook underneath the blank checks without his skin ever coming in direct contact with the MBC on the bills. This *would* also *prevent* the money from coming in direct contact with the interior of the checkbook; only that MBC which sifted down within the folding envelope *might* contaminate the interior of the checkbook . . .

slip op. at 5. (emphasis added). Aside from underscoring the grievous nature of the error in excluding the defense evidence relating to the properties of the MBC powder, the above factual rendition is no more than a wholly speculative hypothesis of guilt which is not more compelling than the other evidence in the case consistent with innocence. Apart from the fact that there was ready access to the room by other persons besides petitioner (cadets are not generally permitted to lock their dormitory rooms), the evidence in this case, even without the demonstration of the action of the powder and evaluated solely through Special Agent Doerr's description of how the powder acted on him when he dusted the bills, indicates that it is more likely that whatever was supposedly taken from petitioner's checkbook did not come from the checkbook at all. The absence of *any* powder in the checkbook after the most rigorous examination of it in the government laboratory leads to no other conclusion. Clearly, the Court of Review had difficulty explaining the absence of powder in the checkbook (or the wallet) and contrived an explanation in order to affirm a conviction. Courts and juries must evaluate the case based on what they have heard or had presented to them, not the case they would

wish they had heard based on what *could* have been. The candid although somewhat naive analysis of the Air Force Court conspicuously demonstrates a failure to apply the required reasonable doubt standard to the evidence in the case. *In re Winship*, 397 U.S. 358 (1970); *Cf., Jackson v. Virginia*, 443 U.S. 307 (1979). Moreover, this Court has implicitly rejected the use of hypotheses such as that employed by the Court of Review here in the less stringent context of administrative *de novo* review. *Woodby v. INS*, 385 U.S. 276, 279 (1966).

We are mindful that in its opinion the Court of Review recited the talisimanic incantation that it had applied the beyond a resonable doubt standard. But its defective and unprecedented reasoning in the use of a factually unsupported hypothetical scenario to sustain the trial court's finding belies any assertion or label that the proper standard was applied. Of equal importance, the Air Force Court's resort to the use of a hypothetical highlights the prejudice to petitioner flowing from the exclusion of demonstrative evidence. Absent evidence relating to the characteristics of MBC, both appellate courts below were deprived of the ability to accurately assess the implausibility to the government's case. The prejudice was then compounded when both of those courts iterated the same, untested facts to uphold petitioner's conviction.

The Court of Military Appeals, in particular, misapprehended the instant issue. That Court was not asked, as its decision would suggest, to review the sufficiency of the evidence. Rather, petitioner complained of the review court's faulty reasoning in its purported application of the beyond a reasonable doubt standard. The Court of Military Appeals' misinterpretation of the error asserted herein and concomitant reliance on the same hypothesized and untested version of events thus did nothing to cure the Court of Review's flawed methodology.

There is no debate about the standard of appellate review to be employed by the service Courts of Military Review. Based on an independent review of the entire record, they must be convinced of an accused's guilt beyond a reasonable doubt. Article 66(c), 10 U.S.C. § 866(c) (1982). Instead of analyzing the existing record before it, that court discussed a theory of guilt not presented at trial. In so doing they failed to conduct their review utilizing the beyond a reasonable doubt standard appropriate for fact finding bodies in criminal cases and deprived petitioner of due process of law.

III

As a general proposition, so called "consciousness of guilt" instructions are proper where an accused's exculpatory conduct is shown to be untrue at trial and therefore leads to an inference of the commission of a prohibited act. *Wilson v. United States*, 162 U.S. 613 (1896); *United States v. McDougald*, 650 F.2d 532 (4th Cir. 1981); II J. Wigmore, *Evidence*, § 273 at 106 (3d ed. 1940). It is also true however, that such instructions must comport with due process. *See, e.g., United States v. Sanchez*, 790 F.2d 245, 252 (2d Cir. 1986); *Cf., Mullaney v. Wilbur*, 421 U.S. 684 (1974).

Instructions which shift the burden of proof to an accused are violative of due process of law. *Mullaney, supra*, 421 U.S. at 701-703. In a line of cases beginning with *Mullaney*, this Court has repeatedly invalidated burden shifting instructions which have the effect of causing an accused to prove (or disprove) an ingredient of the offense. *See, Sandstrom v. Montana*, 442 U.S. 510 (1979); *Francis v. Franklin*, 471 U.S. 307 (1985); *Cf., Patterson v. New York*, 432 U.S. 197 (1977).

In *Sandstrom*, the Court focused on "the way in which a reasonable juror could have interpreted the instruction," 442 U.S. at 514, and concluded that the mere

possibility of prejudice was sufficient to justify reversal. *Id.*, at 526. The State's harmless error argument was rejected. *See also, Connecticut v. Johnson*, 460 U.S. 73, 81 (1983); *but Cf., Rose v. Clark*, 478 U.S ____, 106 S.Ct. 3103 (1986).

The latest in this line of cases, *Francis v. Franklin, supra*, also involved reversing the defendant's conviction because of a *Sandstrom*, burden-shifting presumption on an element of the offense. 471 U.S. at 312-313. In so ruling the Court highlighted the distinction between mandatory presumptions and permissive inferences. *Id.*, at 314-315; *see, Ulster County Court v. Allen*, 442 U.S. 140 (1979). In contrast to the presumptions in the *Mullaney, Sandstrom*, and *Francis* line of cases, permissive inferences run afoul of the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. *Ulster County Court, supra*, 442 U.S. at 157-163.

The synthesis of the Supreme Court's opinions in this area is that a criminal accused, as a matter of constitutional due process, may not be saddled with the burden of establishing the absence of essential facts constituting the crime charged, but may be required to prove facts that are collateral and wholly independent thereof, such as those constituting an affirmative defense.

The instruction as given by the trial judge in this case violates several of the foregoing precepts. Initially, because the instruction here related to evidence adduced at trial, an adequate factual predicate and reasoned nexus to inferred facts must exist before a consciousness of guilt instruction is proper in the first instance. *See., e.g., United States v. Grandmont*, 680 F.2d 867, 869 (1st Cir., 1982); *United States v. Sanchez, supra*. In this case such predicate was absent, for peti-

tioner's statements to other cadets and Captain Steele were not exculpatory statements which were shown at trial to be false or in contradiction to the facts of the case. Petitioner's statements were merely inconsistent with his own in court testimony and that of these other witnesses. Thus, the necessary factual predicate required for an instruction of this nature may not fairly be said to have existed. More importantly though, the tenor of the instruction was such that conceptually the judge was instructing the jury on the government's theory of the case. While an instruction that the jurors must weigh and judge the credibility of witnesses in determining controverted questions of fact may have been in order, the instant instruction essentially told the jury that petitioner had made false exculpatory statements which an innocent person would not make. Petitioner was thus singled out by the trial court as a witness whose testimony was not to be believed. This is particularly true if one regards "the way in which a reasonable juror could have interpreted the instruction." *Sandstrom, supra*, 442 U.S. at 514.

Just because the prosecution and defense evidence disagree is no reason to conclude, as the instruction and then inevitably the jurors did, that petitioner's assertions were "false." To say that the judge's instruction can withstand constitutional scrutiny is to turn a blind eye to the reasoned and common sense justification required of inferential matters such as consciousness of guilt. *Ulster County Court, supra*. Given the posture of the evidence, there was not existent even the degree of rationality between the facts proved and those to be inferred which would have been required was this a case of statutory inference. *See, Tot v. United States*, 319 U.S. 463 (1943); *United States v. Gainey*, 380 U.S. 63 (1965). Finally, the effect of the instruction was to put upon petitioner the insurmountable burden of having to

negate the predetermined falsity of his own testimony. Thus, the prejudicial impact of this burden shifting error is manifest.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. If petitioner's conviction is allowed to stand, a clearer miscarriage of justice is hard to imagine.

COLONEL LEO L. SERGI
(Counsel of Record)
CAPTAIN HENRY J. SCHWEITER
Defense Services Division
Office of The Judge Advocate General of the Air Force
Bolling Air Force Base
Washington, D.C. 20332
(202) 767-1562

Attorneys for Petitioner

Of Counsel:
MAJOR WILLIAM H. LAMB
Wright-Patterson Air Force Base, Ohio 45433

NOVEMBER 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS.

No. 54,177.
ACM 24656.

UNITED STATES, APPELLEE,

v.

DONALD C. ODEGARD, JR., CADET FIRST CLASS
U.S. AIR FORCE, APPELLANT.

Sept. 30, 1987

OPINION OF THE COURT

PER CURIAM:

A general court-martial convened at the United States Air Force Academy on June 22 and 23, 1984, convicted appellant, a cadet, of violating Article 121, Uniform Code of Military Justice , 10 U.S.C. § 921, by wrongfully "steal[ing] four (4) five-dollar bills" from a fellow student. He was tried by members, who found him guilty despite his pleas. He was sentenced to be dismissed to be confined for 2 months, and to forfeit all pay and allowances. The convening authority approved, and the Court of Military Review affirmed, the findings and sentence. We granted review on eight issues.*

---

* The Issues are:

I. WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED BY APPLYING THE WRONG LEGAL STANDARD IN AFFIRMING AP-

PELLANTS CONVICTION IN THAT THE COURT IN EXERCISING ITS FACTFINDING POWER UNDER ARTICLE 66(c), U.C.M.J. FAILED TO EVALUATE THE EVIDENCE BASED ON A REASONABLE DOUBT STANDARD AND INSTEAD USED A HYPOTHETICAL CONSISTENT WITH GUILT WHERE SUCH HYPOTHETICAL WAS NO MORE REASONABLE THAN THE EVIDENCE CONSISTENT WITH INNOCENCE.

II. WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY DENYING A DEFENSE REQUEST TO CONDUCT CERTAIN DEMONSTRATIONS BEFORE THE COURT MEMBERS.

III. WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY GIVING OVER DEFENSE OBJECTION A "CONSCIOUSNESS OF GUILT" INSTRUCTION.

IV. WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY ADMITTING OVER DEFENSE OBJECTION PROSECUTION EXHIBIT 2, A WALLET BELONGING TO THE ACCUSED, WHERE THE OFFICE OF SPECIAL INVESTIGATION AGENT IN CHARGE OF THE INVESTIGATION TESTIFIED THAT HE RUBBED DOWN THE WALLET WITH A KIMWIPE FOR THE PURPOSE OF OBTAINING EVIDENCE OF A BLUE STAIN THAT HE THOUGHT AT THE TIME THAT HE OBSERVED A VERY LIGHT BLUE SMEAR ON THE KIMWIPE AND SO TESTIFIED BEFORE THE COURT MEMBERS, THAT HE THEN THREW THE KIMWIPE IN THE TRASH BECAUSE IT WAS NOT IN THE VIEW OF THE AGENT "EVIDENCE," THAT HE ADMITTED AT TRIAL THAT IT WOULD BE HELPFUL TO KNOW WHAT WAS ON THE KIMWIPE, AND WHERE THE LABORATORY THEREAFTER WAS UNABLE TO IDENTIFY THE STAIN ON THE PLASTIC INSERTS OF THE WALLET BECAUSE THERE WAS INSUFFICIENT QUANTITY TO TEST AND WHERE THERE WAS PREJUDICE TO APPELLANT BY VIRTUE OF THE

Thefts had occurred in cadet's rooms, and the investigation focused upon appellant. A special agent of the Office of Special Investigations (OSI) made arrangement with appellant's roommate to plant money in that person's desk. The money had been treated with methylene blue chloride (MBC), chemical that turns blue when it comes in contact with moisture. Ultimately, the money was taken from the roommate's desk without his knowledge or consent. The ensuing investigation led to discovery of traces of the chemical in appellant's checkbook, where he also routinely kept his money.

The Court of Military Review, in a very thorough and detailed opinion, concluded:

> [W]e see no other reasonable explanation for the presence of MBC in appellant's checkbook other than the conclusion he stole the money from . . . [his roommate's] desk drawer and at some point temporarily stored it in his checkbook. We find this

---

FACT THAT EVIDENCE OF GUILT OF LARCENY OF MONEY WAS BASED UPON STAINS ALLEGEDLY OBTAINED FROM DUSTING MONEY LATER REPORTED MISSING.

V. WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY DENYING A DEFENSE CHALLENGE FOR CAUSE AGAINST THE MEMBER, CAPTAIN STEIN.

VI. WHETHER THE PRETRIAL ADVICE WAS MISLEADING AND SUCH ADVICE PREJUDICED APPELLANT WHOSE CASE WAS NOT CONSIDERED IN LIGHT OF ACCURATE INFORMATION WHERE THERE WAS A DISAGREEMENT BETWEEN THE ARTICLE 32 INVESTIGATION OFFICER AND THE STAFF JUDGE ADVOCATE ON AN ISSUE OF FACT.

VII. WHETHER APPELLANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL.

VIII. WHETHER THE PETITION FOR NEW TRIAL SHOULD BE GRANTED.

> evidence sufficient to support the trial court's finding of guilty.

Unpub. op. at 6.

Appellant asserts that the Court of Military Review applied an improper standard in assessing the sufficiency of the evidence. However, we note the following language from the opinion:

> The critical issue here, and one which was argued vigorously before the court members, in appellate briefs and in oral argument before us, then becomes, whether the government met its burden of proving the guilt of appellant *beyond a reasonable doubt.* Although the prosecution had only a limited amount of material circumstantial evidence with which to work we believe they were successful.

Id. at 5 (emphasis added). Thus, it appears that the Court of Military Review did conclude that the evidence was sufficient beyond a reasonable doubt to sustain the conviction.

[1, 2] We review questions of sufficiency of the evidence to determine if there is "some legal and competent evidence from which a court-martial may find or infer beyond a reasonable doubt those facts required by law for conviction." *United States v. Harper,* 22 M.J. 157, 161 (C.M.A. 1986); *see Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Applying this standard, we conclude that the evidence as outlined and analyzed by the court below is sufficient to sustain a conviction for larceny.

We have reviewed the remaining issues raised by appellant and conclude that no error which "materially prejudices . . . [his] substantial rights" has been committed. Art. 59(a), UCMJ, 10 U.S.C. § 859(a).

Finally, turning to appellant's petition for a new trial based upon newly discovered evidence, we agree with the Court of Military Review that the petition was not properly filed. Unpub. op. at 6-7. We do not desire, however, that appellant be denied the opportunity to seek a new trial from the Judge Advocate General in accordance with established rules and procedures. Toward this end, we note that Article 73 of the Code, 10 U.S.C. § 873, does not prescribe a particular form or particular procedures to be followed. Accordingly, we hold that the petition shall not be dismissed on the jurisdictional basis that it was not timely filed.

The decision of the United States Air Force Court of Military Review is affirmed. Appellant shall have 60 days from the date of this decision in which to conform his petition to the requirements of R.C.M. 1210, Manual for Courts-Martial, United States, 1984.

Judge SULLIVAN disqualified himself from participation in this case.

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 24656

UNITED STATES

v.

CADET FIRST CLASS DONALD C. ODEGARD, JR.,
FR 203-48-3718 UNITED STATES AIR FORCE

17 OCT 1985

Sentence adjudged 23 June 1984 by GCM convened at The United States Air Force Academy, Colorado. Military Judge: Jeffrey W. Cook.

Approved sentence: Dismissal, confinement at hard labor for two (2) months and forfeiture of all pay and allowances.

Appellate Counsel for the Accused: Colonel Leo L. Sergi and Major William H. Lamb. Appellate Counsel for the United States: Colonel Kenneth R. Rengert, Colonel Andrew J. Adams, Lieutenant Colonel Donal F. Hartman, Jr., and Lieutenant Colonel William H. Seckinger, USAFR.

Before

FORAY, MURDOCK, and O'HAIR
Appellate Military Judges

DECISION

O'HAIR, JUDGE:

Contrary to his pleas, the appellant was found guilty of stealing four five dollar bills from the desk drawer of

his roommate at the United States Air Force Academy on 3 February 1984. He was sentenced to a dismissal from the service, confinement for two months and total forfeitures. On appeal, he has presented a number of asignments of error, including a request for a new trial. The primary focus of this appeal, however, addresses his assertion of the insufficiency of the evidence to convict him of the one charge and specification.

I

As developed at trial, the facts suggest that prior to February, 1984, there was a problem at the Academy with money being taken form the cadets' rooms. The appellant's air officer commanding, Capt Steele, contacted the Office of Special Investigation (OSI) regarding this matter and they decided to "plant" some money in the appellant's room in an attempt to catch the thief. This necesarily involved requesting the appellant's roommate, Cadet Pizzarello, to assist them. Before the four five dollar bills were placed in the room, Special Agent (SA) Doerr dusted each of them with methylene blue chloride (MBC). This is a nearly invisible powder which, when it comes into contact with something moist or wet, turns blue. Next, the money was placed in an envelope which had been fabricated by SA Doughman so that it was identical in size to the money; and only the top portion of one end of the enveloped was cut away so that the edges of the bills were exposed when viewed from the top of the envelope, but not from the bottom. The intent of this scheme was that the thief's hands would become contaminated by the MBC when he took the money and the natural moisture of the hands would cause the MBC to turn blue and stain the hands the same color.

Pizzarello was not informed about the MBC, but was only instructed not to touch the bills. He was further

told to take the money to his room where, in the presence of the appellant, he was to display the money and then place it in his top desk drawer. These instructions were followed at mid-day on Thursday, 2 February 1984, at which time he told appellant he had some extra money but he would be unable to spend it that weekend. Pizzarello last saw the money in the desk drawer at approximately 1145 hours on Friday, 3 February when both he and appellant were preparing to leave their room and go to lunch. Pizzarello returned to his room following lunch, but since the appellant was there he did not look in the drawer. Both roommates had a 1300 hours class that day and Pizzarello was the first to leave the room for class. At 1330 hours, while both cadets were in class, Capt Steele discovered the money had been removed from the drawer.

Several hours later on 3 February, Capt Steele summoned appellant and Cadet Weeth to his office. He informed then about the theft of the money from Pizzarello's desk drawer and asked if they had seen the missing money. Simultaneous with this he surreptitiously examined their hands, looking for blue stains. He saw no stains. Capt Steele continued his informal investigation of the theft on the following morning during a Saturday morning inspection. In conjunction with an inspection of the cadets' rooms, he also conducted a manicure inspection of the occupants of those rooms inspected. Appellant's room was among those inspected and Capt Steele detected no blue stains on either appellant's hands or on any other hands he viewed.

OSI participation in this operation did not resume until Monday morning, 6 February, when appellant and Pizzarello were summoned to the OSI office for questioning by SA Doerr. Following an advisement of rights, appellant denied any knowledge about either the theft or the money and he consented to the search of his

room. To aid him in locating traces of MBC, SA Doerr used paper tissues called kimwipes which were dampened by spraying them with liquid glass cleaner. After SA Doerr wiped a section of appellant's wallet with a kimwipe, he noted a "very light blue smear or smudge" on it. He threw this kimwipe in the trash can, but retained the wallet. Seeing there was no money in the wallet, SA Doerr remarked to the appellant that he was broke. Appellant responded that he keeps his money in either his pocket or checkbook and not in his wallet. SA Doerr then asked to see his checkbook. Using a clean, dampened kimwipe, SA Doerr wiped the exterior of the checkbook and reported he found no blue stains. However, after he thoroughly wiped "underneath the side with the cardboard backing," a plastic area which was underneath the checks, he remarked there was an "instant blue smear all over my kimwipe." The smear was described as being round and about the size of a nickel. No other traces of blue were detected on the kimwipes after other articles and areas of the room were wiped.

SA Doughman, while assisting in the search of the room, asked appellant to place his hands in the sink under running water. After he complied, the agent detected what he believed was a light blue stain in the crevice of the palm of appellant's hands. SA Doerr also observed the wet hands and he testified he could see where the MBC had combined with the water to turn the water blue in the creases of his hands. He then asked appellant, "What's that?" and appellant's only response was, "You mean the blue stuff?" Capt Steele remembers hearing appellant make this remark, however, SA Doughman does not. Neither of the agents wiped appellant's hands with a kimwipe in an attempt to absorb any MBC which may have been present nor did they wipe the interior of the sink for the same purpose.

The checkbook, to include the checks and check register, the wallet, the kimwipe with the blue smear, and a sample of the MBC used by OSI were sent to a laboratory. The first three items were examined for the presence of a chemical which was identical to that found in the OSI sample of MBC and such a presence was confirmed on only the kimwipe. No MBC was found on the wallet or the checkbook and its contents. This fact was also confirmed by an analysis by a chemist who was hired by appellant to conduct a similar examination.

An additional bit of prosecution evidence came from Cadet Weeth who testified regarding a conversation he had with appellant during March, 1984. Appellant asked him if he knew where the marked money had been located in his room. When Weeth explained that he believed it was in Pizzarello's top desk drawer, appellant turned to him and said, "That's right," and added that it was in an enveloped sitting on a *Playboy* magazine. He said he had read the *Playboy* two or three times and could have gotten whatever dye or substance on his hands at the time he read it.

The appellant testified in his own behalf and strenuously maintained his innocence. He conceded he heard Pizzarello's remark on 2 February about having some extra money but because appellant was sitting with his back to Pizzarello at the time of the remark, he did not know where the money was being kept. During cross-examination, he explained that he did not tell Weeth he had gotten the *Playboy* magazine from Pizzarello's top desk drawer, but rather Pizzarello had personally given him a couple of *Playboy*'s to read. Appellant also explained he does not carry much cash, but writes checks for most purchases; and when he does have cash, he carries it in his wallet, contrary to what SA Doerr testified. Furthermore, appellant maintained he was silent when Doerr asked him why the water on

his hands had turned blue. Appellant also insisted that Capt Steele did not inform him that money had been stolen from Pizzarello until early Monday morning, and not on Friday afternoon.

One of appellant's instructors and three cadets testified they had been with appellant either later in the day on 3 February or during that weekend. None of them saw any blue stains on his hands or fingers. Although none of them were aware of the theft and were not looking for blue stains, all of them were positive they would have noticed such stains if there had been any on his hands.

A physician assigned to the Academy testified he had been visited by appellant in May, 1984, and asked to examine appellant's hands. The witness notice blue veins in the palms of appellant's hands which were in various patterns and no more prominent than those of other fair-skinned individuals.

The appellant called a forensic chemist who had examined the government's evidence for the presence of MBC and he could find none. He was asked a series of hypothetical questions based upon testimony by Pizzarello regarding his handling of the bills. Specifically he was asked whether there would be traces of MBC in a desk drawer if someone had either blown on bills dusted with MBC while holding them over the drawer or had rubbed the bills together between one's fingers over the drawer. He opined there probably would be MBC contamination in the drawer unless it had been removed. He then testified he completely wiped out Pizzarello's top desk drawer and found no evidence of MBC. He also testified that it usually takes two to three days for someone to remove MBC from one's hands; the most common residual stains would be in the cuticles. He examined the stain pattern on the kimwipe SA Doerr used on the checkbook and opined it was not consistent with a

"wiping" movement as described by SA Doerr, but more like a "blotting" movement. With respect to the paper check register he indicated it would be impossible to remove evidence of MBC entirely from that paper, whereas it would be possible to remove it completely from the plastic portions of the checkbook. From this information it was to be concluded the check register was never contaminated with MBC.

The final defense witness was appellant's father who confirmed that his son carries small amounts of money in his wallet, but predominantly writes small checks or uses credit cards for purchases.

II

The critical issue here, and one which was argued vigorously before the court members, in appellate briefs and in oral argument before us, then becomes, whether the government met its burden of proving the guilt of appellant beyond a reasonable doubt. Although the prosecution had only a limited amount of material, circumstantial evidence with which to work, we believe they were successful.

The evidence showed that appellant had knowledge of the presence of some money in Pizzarello's desk, although he disavowed knowing exactly where it was located. Appellant also had the opportunity to steal the money on Friday, 3 February, after he returned from lunch and before reporting to his first afternoon class. The absence of any blue stains on his hands and fingers that day or the next can be explained by noting the protection afforded by the envelope SA Doughman fabricated. As we view the facts, appellant could have picked up the money-bearing envelope without touching the bills, and thereafter folded it in half several times with the exposed portion of the bills toward the inside of the fold. In this manner, the folded envelope could be

secreted in a pocket of his checkbook underneath the blank checks without his skin ever coming in direct contact with the MBC on the bills. This would also prevent the money from coming in direct contact with the interior of the checkbook; only that MBC which sifted down within the folded envelope might contaminate the interior of the checkbook. It was this small amount of contaminant which SA Doerr found on his kimwipe after he carefully and thoroughly wiped all areas within the checkbook. This thoroughness on his part can explain why no residue was located on the checkbook when it was re-examined at the laboratories.

We certainly have no way of knowing the exact manner in which the money was handled after it was removed from Pizzarello's drawer. Further, we place little weight on testimony that traces of suspected MBC were found either somewhere on the wallet or on appellant's hands on Monday, 6 February. However, one fact remains irrefuted and that is that traces of MBC were found in appellant's checkbook by SA Doerr. The agent's direct testimony regarding this discovery is as follows:

Q After you went back to pick up the checkbook what did you do?

A I did the same thing I did with the wallet. I obtained a fresh kimwipe, sprayed the kimwipe. I may have sprayed some of the spray directly on the outside of the checkbook and then also some on the kimwipe. I found no blue stains on the outside. On the inside, however, inside the flaps, as you open the checkbook you have your two flaps here for your deposit book and your checks. Underneath the side with the cardboard backing I cleaned out that inside, pulled it out and there was an instant blue smear all over my kimwipe.

Q Going back, when you say you took, did you take a fresh kimwipe? A clean one?
Yes, sir, I did.
Q Did you use the same spray you were using before?
A Yes, sir.
Q When you wiped the outside of the checkbook what did you find?
A Nothing.
Q And then you wiped the inside of the checkbook?
A Yes, sir.

Considering all of the evidence presented to the court, we see no other reasonable explanation for the presence of MBC in appellant's checkbook other than the conclusion he stole the money from Pizzarello's desk drawer and at some point temporarily stored it in his checkbook. We find this evidence sufficient to support the trial court's finding of guilty of the charge and specification. Article 66(c), Uniform Code of Military Justice (U.C.M.J.); *United States v. Frierson*, 20 U.S.C.M.A. 452, 43 C.M.R. 292 (1971); *United States v. Landes*, 17 M.J. 1092 (A.F.C.M.R. 1984).

III

The only other assignment of error we choose to address is: THE PETITION FOR NEW TRIAL SHOULD BE GRANTED. This assignment is based upon a document entitled "Verified Petition for Dismissal of Charges, or in the Alternative, for a New Trial," which was submitted to the convening authority before he took action on this case. This document was signed, under oath, by the civilian attorney who represented appellant at trial and it contains a number of affidavits designed to support his argument. The convening authority did not afford appellant the desired relief and

this document was submitted to this Court pursuant to a MOTION TO FILE DOCUMENT AND TO CONSIDER SAID DOCUMENT AS A PETITION FOR NEW TRIAL. Appellate defense counsel, in that motion, acknowledged that the normal procedure for presenting this document to the Court, as prescribed by Article 73, U.C.M.J., would be to have it referred to us by the Judge Advocate General. Counsel reasoned that to require compliance with this procedure would be elevating form over substance as the document was already physically before the court as an allied paper. This motion was denied because it was not properly addressed nor was it in the proper format, citing Article 73, U.C.M.J., and R.C.M. 1210.

The former reference provides:

> Any time within two years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before a Court of Military Review or before the Court of Military Appeals, the Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise the Judge Advocate General shall act upon the petition.

Further procedural requirements for such a petition are found in R.C.M. 1210(c) wherein it prescribes that the ". . . petition for a new trial shall be written and shall be signed under oath or affirmation by the accused, by a person possessing the power of attorney of the accused for the purpose, or by a person with the authorization of an appropriate court to sign the petition as the representative of the accused."

Based upon the above statutory and implementing criteria, this Court finds the petition for new trial was not properly addressed, not properly referred to this

Court and, more importantly, procedurally deficient in that it was not signed under oath, by either the appellant, a person with a power of attorney for that purpose, or by a person appointed by a court. For these reasons we find the petition is not properly before this Court and thus we do not address the information contained therein. The U.C.M.J. and the implementing Manual for Courts-martial, 1984, prescribe rules for the operation of our military justice system and it is our duty to insure compliance. Our decision today, however, does not in any way impede appellant from resubmitting this document in the proper format.

We have considered the remaining assignments of error and consider them to be without merit.

The finding of guilty and the sentence are

AFFIRMED.

FORAY, Senior Judge, and MURDOCK, Judge, Concur.

OFFICIAL:

CHARLES L. WILLE

Charles L. Wille
Captain, USAF
Chief Commissioner

U.S. GOVERNMENT PRINTING OFFICE 1987—197 264/62019